Filed 7/27/09 Robinson v. Charlton A. CA1/2

Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

KIM M. ROBINSON, Petitioner, v. CHARLTON A. et al., Respondents.	A104663 (Alameda County Super. Ct. No. RF-03097245)

Kim M. Robinson represented Cynthia J. (Mother) in the trial court proceedings on her custody dispute with Charlton A. (Father) and in her appeal from the lower court's order awarding custody of their daughter to Father. Father was represented on appeal by Robert A. Roth. We affirmed the lower court's ruling on custody in our nonpublished opinion filed February 10, 2005. We also imposed sanctions in the amount of $15,030 against Robinson. Subsequently, disciplinary charges were brought against Robinson and the State Bar Court of California (State Bar Court) held a hearing. The State Bar Court filed its decision on May 6, 2008, and found clear and convincing evidence did not establish that Robinson committed acts of moral turpitude or other misconduct warranting discipline.

Robinson filed a "petition for writ of error *coram vobis*" in the Supreme Court and asserted that the hearing in the State Bar Court established that our prior decision involving her appeal from the custody order contained five errors. She requested an order vacating this court's award of sanctions against her and for an award of attorney

fees and/or sanctions against Father and Attorney Roth in the amount of $75,000. She also requested an order directing us to correct the five alleged errors. The Supreme Court granted Robinson's petition for writ of *coram vobis* without asking for any briefing from Roth and transferred the matter to us with directions to vacate the award of sanctions against Robinson and to reconsider the award in light of the State Bar Court decision.

On remand, Robinson asks us to order restitution of the sanctions she has paid Father and to reverse our disposition in our earlier, final decision, which affirmed the lower court's ruling on custody. She also seeks sanctions in excess of $166,000 against Roth and Father.

We conclude that the State Bar Court's decision has no effect on our determination to impose sanctions against Robinson. Any alleged errors in our prior decision were based on the record before us and Robinson was responsible for providing this court with a complete record that included all relevant facts. She was also responsible to use the available procedures to correct any alleged errors. Robinson is now belatedly attempting to reargue the facts or raise new facts without making any attempt to explain how any of these alleged new facts satisfy the requirements for a writ of *coram vobis.*

The State Bar Court decision does not alter our conclusion that Robinson appealed from nonappealable orders, did not provide a complete rendition of the facts, raised issues for the first time in her reply brief, and pursued an appeal without merit. Additionally, the State Bar Court decision has no bearing on our determination that Robinson's representation of Mother on appeal presented the appearance of, if not an actual, conflict. Accordingly, we reject Robinson's requests and reaffirm our prior order of sanctions.

BACKGROUND

The Child Custody Action

The facts underlying this lawsuit regarding the child custody lawsuit have been detailed in our prior opinion. We again relate those facts as set forth in the prior decision

and only modify those few, immaterial facts that are contradicted by undisputed evidence presented at the hearing before the State Bar Court of California.

Mother and Father were never married. They are the parents of a daughter born in January 1998. About five months after the daughter's birth, Mother brought a paternity action through the San Francisco District Attorney's Office. Blood testing indicated that he was the father. On August 13, 1998, Father stipulated to parentage and assumed 50 percent custody by agreement of the parties.

In September 1998, the parties and the district attorney's office entered into a stipulation for judgment regarding support, which provided for Father to pay $600 for child support and an additional $200 for childcare each month.[1] In addition, under a separate agreement, Father was to pay $2,400 a year into an education fund and Mother was to pay $1,200 a year into the education fund.

On October 20, 1999, a modified support agreement was filed, which included removal of the district attorney's office from the case. The parties agreed that, rather than paying child support and child care expenses directly to Mother, Father would purchase a condominium and make payments toward the housing expenses and Mother would stay in the condominium. Father would pay the mortgage, taxes, insurance, and condominium association fees until January 1, 2001. Mother would pay utilities and maintenance expenses. After January 1, 2001, Mother would pay Father $300 per month for rent in addition to paying the utilities and maintenance expenses.[2] Father also agreed that if the condominium were sold, half of the net proceeds would be deposited in the education fund for their daughter. Mother executed a lease with Father as the landlord. The parties agreed that if changed circumstances required modification of the agreement, they would consult with each other and use a mediator if necessary.

On November 15, 1999, the parties entered into a stipulation regarding custody, visitation, and child support. The parents were to share joint legal and joint physical

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[1] Father actually paid $300 a month for childcare.

[2] On remand, Robinson disputes this fact and maintains that Father charged mother $775 to $800.

custody, with the child being in the physical custody of each parent 50 percent of the time. The agreement provided that there would be no child support and that no child support arrears existed at the time of the signing of the agreement.

In January 2000, Mother moved from San Francisco to a condominium in Oakland purchased by Father. Father moved with his new wife to a home in East Palo Alto in January 2001. The parties agreed that their daughter would attend preschool in Oakland at a school near Mother's home. Because of the distance between the parents' homes, they agreed that Father would have custody primarily on weekends and their child would live with Mother during the school week.

Mother failed to pay the promised $300 rent each month after January 1, 2001. Father sent Mother an e-mail dated May 23, 2002, alleging that he could no longer afford to keep making the mortgage payments if she failed to pay the agreed-upon rent to him. If she could not make the payments, he told her that she would need to find alternative, affordable housing.

On November 7, 2002, Father filed an order to show cause (OSC) seeking to modify custody so that their daughter could go to school in the Palo Alto School District where he resided, and which he believed was one of the best public school districts in the country. He stated that the change in circumstances was that his daughter was starting kindergarten.

On November 20, Mother through her attorney, Michael J. Bailey, filed a motion to modify child support and for a venue change to Alameda County.[3] She also requested attorney fees and costs.

On December 5, 2002, Mother filed an amended motion asking permission to relocate with their daughter to Los Angeles County and a change of venue to that location. She stated that she "must change my residence and I have sole physical custody of the child." Father filed his response on December 23. He requested primary physical custody of their daughter and indicated that he did not consent to Mother's request. He

[3] Mother had actually signed and completed her motion on October 17, 2002; father signed his motion on November 4, 2002.

stated that Mother did not have sole physical custody of their daughter. He requested a custody evaluation.

On January 21, 2003, the court sent the parties to mediation and they reached a partial agreement, which was set forth in an order entered on March 25, 2003.[4] The order stated that the motion to change venue to Alameda County was granted upon stipulation of the parties and that all remaining issues would be addressed by the receiving court. It also provided that "the parties stipulate to the following temporary custody and visitation plan pending adjudication of the pending custody and visitation issues by the receiving court: [¶] The parties agree that the minor child . . . shall remain in her current school for the remainder of the current academic year. [¶] Father shall pick [daughter] up from school every Friday and Mother shall pick up [daughter] from Father's home every Sunday evening except as provided below. [¶] One weekend per month, Mother shall pick [daughter] up from Father's home on Saturday at 3:00 p.m., and one weekend each month Mother shall pick [daughter] up from Father's home on Sunday at 9:00 a.m. [¶] Each Wednesday, Father shall pick [daughter] up from school and Mother shall pick [daughter] up from Father's home in the evening. [¶] Father shall have one uninterrupted vacation week with [daughter] during the summer 2003. [¶] Thanksgiving shall be with Father, and Easter shall be with Mother."

On June 9, 2003, Father filed in the Alameda County Superior Court a motion to modify child custody, child support, and visitation. He declared that he wanted their daughter to attend Duveneck Elementary School (Duveneck), a public school in Palo Alto near his home. He observed that Mother wanted her to attend a private school in Oakland. In support of his request, he asserted that students at Duveneck received a score of 944 on the Academic Performance Index (API), placing the school in the top 1 percent of the schools in the country. He asserted that he had secured a place for their daughter at Duveneck. He added that he would be able to save between $150,000 and

[4] The order in the record does not have the actual date of filing. At times the parties state the order is dated March 25, and at other times they refer to the order as having the date of March 24.

$200,000 over the next 12 years by not sending her to a private school. He affirmed that he supported the bond between Mother and their daughter and that he was ready to make all reasonable accommodations to ensure Mother could spend the maximum amount of time with their daughter.

On July 3, 2003, Mother filed her response and stated that she did not consent to the order requested and asked for joint legal and sole physical custody of their daughter. She stated that their daughter was enrolled at Mills College Children's School in Oakland, a private school. She had just finished kindergarten at Horizon School in Oakland. She declared that her daughter had friends at these schools and was "thriving" in Oakland. She stated that Father claims he is the owner of the condominium where she lives with their daughter and she was just served with a three-day notice to pay rent or quit. She alleged that she was the one who had actually purchased the condominium. She requested modification of support so that she could litigate the issue of the ownership of the condominium.

On July 11, 2003, Father filed a separate complaint for unlawful detainer against Mother in the Alameda County Superior Court. He charged that Mother owed him $3,600 in rent.

The parties mediated their custody dispute on July 1, 2003, and they put their agreement on temporary child support on the court's record on July 8, 2003. The court stated that "both parties are excellent parents and have cooperated well in parenting their daughter. Due to the geographic distance, there is no compromise that will resolve the issue of [their daughter's] primary residence during the next 12 years. A custody evaluation will be important to reached [*sic*] an informed decision. There is a time constraint in that school will begin at the end of August. . . ." The court stated that the parties were to maintain the current custody schedule, arrange for a custody evaluation, and, effective July 1, 2003, Father was to pay child support in the amount of $1,435 per month and pay one-half that amount for June.

The parties agreed to a custody evaluation by a licensed psychologist, Gloria Wu, Ph.D. After Wu conducted her evaluation, she submitted her report. Wu concluded that

Father was concerned about Mother's "precarious financial situation" and its impact on their daughter. Wu indicated that Father expressed concern that Mother had a history of being partially employed or unemployed. She stated that Father had hoped his assistance would help Mother become more financially stable, but he had concluded that this would not happen as long as Mother remained financially dependent on him. Mother claimed that she had now become a mortgage loan consultant and was a newly commissioned notary public. Father provided documents establishing that he owned the condominium in which Mother had been residing as well as that he was making the mortgage payments on the property. Mother was contesting the eviction by asserting there was no landlord-tenant relationship. Mother reported that she had made preparations to secure another residence in Oakland should Father evict her.

Wu set forth the following conclusions: "An objective comparison of the two proposed schools was hindered because standardized test scores for [the Oakland school] were not available. . . . [¶] Despite the inability for a direct comparison, the results for Duveneck Elementary are worth noting. Duveneck scored in the highest decile (a rank of 10) statewide in the API rankings. . . . [¶] [A person] at the Palo Alto Unified School District Voluntary Transfer Program confirmed Father's claim that a student who had been accepted into the transfer program would be guaranteed a slot in the Palo Alto School District through the twelfth grade as long as the student remains a resident of East Palo Alto. [She] did not entirely substantiate Father's claim that students who applied after kindergarten would have a more difficult time gaining acceptance into the program but clarified that students are only eligible to apply for the transfer program through the second grade. [She] confirmed that a child would not be required to repeat kindergarten simply based on [his/her] age if he/she had already successfully completed kindergarten. That child would be placed in whatever grade-level was deemed appropriate."

Wu indicated that Mother was involved with her daughter's education and the daughter was doing well in school. The daughter was at the top of her class, showed great leadership skills, was a positive thinker, was very supportive of her peers, and was ready to enter the first grade. Wu spoke to the girl's kindergarten teacher. The teacher

told her that if the school in Palo Alto required the girl to repeat kindergarten, she believed the girl would suffer a loss in self-esteem and she would become bored. The teacher seemed confident, however, that the girl would be ready for first grade in the Palo Alto school district.

In summary, Wu stated that determining the custodial arrangement during the school week that is in the best interest of the child "is an extremely difficult task in this case as it is difficult to assess how the relevant factors should be weighted in making the custody determination." She noted that "[t]here is no argument that both parents (including the stepmother) are outstanding parents who have a commendable history of successfully co-parenting throughout [the daughter's] life. There are no issues involving drug and or alcohol abuse, child abuse and or neglect, nor mental or emotional stability of either parent. Both parents have flexible work schedules and are available to care for [their daughter] without the need for regular childcare. . . . Until the issue of where [their daughter] would be attending school arose, parents have been able to successfully and satisfactorily work out most, if not all of the co-parenting issues/disputes in the past."

Wu summarized the critical issue as "the question of whether the benefits of the many strong and wonderful educational opportunities that [the daughter] will have access to if she lives with her father during the school week outweigh the potentially negative impact of changing the custody schedule and separating [her] from her mother during the school week." If it were merely school choice, she stated that Duveneck Elementary in Palo Alto was the superior choice. She acknowledged that the education at St. Leo's in Oakland was good, but she believed the education in Palo Alto would be excellent. Further, Palo Alto would save the family money. She cautioned that if she attended school in Palo Alto, the parents "must work with the school immediately to address the issue of whether [she] will repeat kindergarten or whether she is qualified to advance to first grade." She remarked: "An assessment by Duveneck's staff should be conducted immediately to make this determination so that [her] self-esteem is not negatively impacted by being placed in a class where she will be either bored (if placed in kindergarten again) or unable to successfully work at grade level (if placed in first grade

prematurely). A staff member at Duveneck confirmed that a five-year-old student does not need to be automatically placed in kindergarten because of her age if she has already successfully completed kindergarten."

Wu expressed concern that it was not so clear what impact the daughter would suffer from being separated from Mother for the majority of the school year. She noted that Father's belief that Mother would have a harder time adjusting to this than the daughter "may or may not be accurate. However, it would be important for Father not to dismiss or minimize the impact of this separation" on their daughter.

Wu also addressed Father's claim that their daughter should be with him because of Mother's financial instability and poor lifestyle choices. The eviction of Mother was not going to be resolved until later, and Wu conceded that the daughter would have a more stable living situation with Father. She noted, however, that Father was "serving as the catalyst for the unstable housing situation that Mother currently faces and stands to benefit from his attempts to evict her. However, the documentation submitted by Father demonstrates that Father attempted to address and resolve the housing issue with Mother over a year ago which argues against the conclusion that could be drawn that Father is merely resorting to the use of strong-arm tactics as a means to an end."

Wu expressed concern about how Mother would fare once Father stopped providing financial support. Mother's 2002 tax return indicated that her annual salary was less than $10,000. Mother had been with her current employer for less than two months and this job was strictly based on commission. Wu stated that it "should not be concluded that Mother would be unable to continue to provide the excellent parenting that she has in the past or that a change in custody is warranted because of her financial situation. The argument for [their daughter] living with her Father during the school week should not be based solely on Mother's precarious financial situation although these factors must be considered, as they will impact [the daughter]. Although not a dispositive factor, the argument that [the daughter] would benefit from living with the parent who can provide a stable living environment that will not be impacted or disrupted by financial situations should not be discounted either."

Wu recommended the daughter live with the Father during the school week because of the educational opportunities that she would have, but she made it clear that Mother had been a good parent and that her relationship with the daughter must be maintained. She stated that the ideal solution would be for Mother to relocate closer to Father's residence so that both parents could share custody while affording their daughter the opportunity to attend an excellent school. If Mother could not relocate, "the time-share should then be such that she is given maximum time" with her daughter. If the court decided to have the daughter live with Father during the school week, Wu admonished that Mother should support this and not convey her own anxiety to her daughter. If the court decided that the impact of disrupting the girls' relationship with Mother did not outweigh the benefits of the educational opportunities she would have in Palo Alto, Wu recommended that the daughter attend St. Leo's in Oakland and reside with Father during the summer. Wu's final recommendation was that the girl attend Duveneck in Palo Alto.

On August 18, 2003, Mother hired another lawyer, Robinson, to join Bailey in representing her in the custody issues. Both Robinson and Bailey appeared with Mother at the custody hearing on August 18, 2004. The court requested information about whether the girl would have to repeat kindergarten at Duveneck. Counsel for Father represented that the school would take the first 20 days to assess her. If she were in the top 5 percent of the class, she could advance to first grade. Counsel for Mother stated that Mother would pay for the private education of the girl if she went to school in Oakland. The court stated that it had given this case a "lot of thought . . . ." The court proclaimed that it believed it would be best for the child to attend school in Palo Alto. The court clarified that it was not changing custody because Mother would still have physical custody from Thursday after school until she returned to school on Monday. Rather than changing custody, the court was making "a change in custodial time as between the parents" and the child. The hearing was continued until August 21.

At the continued hearing on August 21, only Robinson appeared on behalf of Mother. At this hearing, the court indicated that it was satisfied that attending school in

Palo Alto would be best for the child if she were promoted to first grade. However, the court wished to revisit the issue in the event the school deemed she was not ready to attend first grade. The court stated that the matter would be heard again on October 1, after the school determined whether the girl would be placed in kindergarten or first grade.

School in Palo Alto was to begin the following Tuesday, August 26, 2003, and the court told Mother she was to have physical custody of the child until then. The court told the parents that they should both be at the school when the child attended school for the first day. The court set forth the following custody schedule: custody to Father from after school on Mondays until the beginning of school on Thursday mornings and custody to Mother from Thursday afternoons after school until Monday mornings before school. After the school determined the child's placement in either kindergarten or first grade, the court, on October 1, would consider the best arrangement for the child.

Prior to the hearing on October 1, Mother filed an ex parte motion to award her custody and to award Father visitation with the child on weekends from Friday after school until Sunday evening. The court denied the request.

On August 26, the first day of school in Palo Alto, Mother took the child directly to the school. Mother went to the principal's office without waiting for Father or notifying him that she was going to talk to the principal without him. Father stated that Mother made a number of demands of the principal and declared that the child was not eligible to attend the school because she had primary custody of her and her residence was in Oakland. Mother claimed that the principal told her that there were no openings in the first grade class at Duveneck and that the child was not eligible to attend because her primary residence was in Oakland.

On Tuesday evening, after Mother had spoken with the principal, Father went to Mother's home to get their child to take her to Duveneck on Wednesday. Mother, however, refused to open the door and let their child come with him. Mother stated that he did not have a written court order and therefore she did not have to let the child go with him.

On Wednesday, August 27, Mother called Father and told him that he could pick their child up from St. Leo's in Oakland after school, and she would pick the child up from his house that evening at 7:00 p.m. Father said he would pick her up but did not agree to let Mother pick her up later that evening. Counsel for Father called Robinson, Mother's attorney, and told Robinson to let Mother know she should not try to pick up the girl that evening. Father picked up the child from the Oakland school and, at 9:30 p.m. that evening, Mother arrived with a police officer at Father's home. She had provided the officer with a copy of the temporary order of March 25, 2003, that set forth the stipulated agreement between the parties at the January mediation. Father told the officer about the subsequent order following the hearing on August 18 and 21, but Mother said that ruling did not matter. Father's only proof of the court's order on August 21 was the clerk's minutes, and the officer said he could not consider that document as evidence. At the direction of the officer, Father let Mother take the child.

On August 28, Father filed an OSC for child custody and visitation and a request for ex parte relief. Father requested custody from 6:00 p.m. on Sunday until the Friday morning school drop-off and requested the order stay in effect until the next court date on October 1. The following day, on August 29, 2003, the court issued an order granting Father custody of the child as requested until the continued hearing in this matter. On that same date, August 29, a hearing was scheduled in the unlawful detainer action that Father had brought against Mother to regain possession of the condominium in Oakland. The parties entered into a stipulation that Mother would vacate and surrender possession of the premises by midnight on September 30.

On that same day, August 29, Father spoke with the principal at Duveneck. She told him that an opening in first grade had become available the day before but, since their daughter had not yet attended the school, she was not able to observe the child and consider her for this opening.

Father called Mother during the early afternoon on Sunday, August 31, 2003, and left messages at her residence and on her cell phone confirming that he would pick up their daughter that evening at 6:00 p.m. pursuant to the court order of August 29. When

Father arrived at the home, no one was home. The following day, on Monday, Father went to Duveneck and learned that Mother never brought her there. He also called St. Leo's in Oakland and learned that she was not there either.

On September 2, 2003, Mother's attorney filed an affidavit seeking the disqualification of Commissioner John C. Porter, who had presided over the earlier hearings. The following day, on September 3, Mother's attorney sent Father's attorney a letter that stated in pertinent part: "Please be advised that after being evicted from her residence by your client on Friday morning, August 29, 2003, [Mother] exercised her presumptive right under Family Code § 7501 and [*In re*] *Marriage of Burgess* (1996) 13 Cal.4th 25 to relocate with the minor child. I will be filing a formal motion to modify visitation as soon as the jurisdictional issues in this case (i.e., the CCP § 170.6 motion against Commissioner Porter) are resolved. Until then, the court is without jurisdiction to take any action in this matter. [¶] [Mother's] move occurred prior to issuance of the ex parte order changing custody on August 29, 2003, which I received only by fax from your office in the afternoon that same day. The validity of the ex parte order is questionable in any event, and [Mother] is not aware of the order. Your position expressed earlier today by telephone that this is a child abduction situation is therefore incorrect and if [Father] persists in that vein I will view it as a malicious prosecution situation."

On September 12, Father filed another OSC regarding child custody and visitation, requesting sole physical and legal custody until October 1. He stated that Mother had continued to hide his daughter from him and to defy the rulings of this court. Neither Mother nor her attorney had given him any information regarding the whereabouts of his daughter. Further, his daughter had not attended school at Duveneck. He opened a child abduction case on September 2, 2003, with the district attorney's office. Robinson told the district attorney investigator that the court order dated August 29, 2003, was not valid. On September 12, the court issued an order providing Father with sole legal and physical custody of the child until further order of this court.

On September 15, 2003, Bailey withdrew as counsel for Mother and Robinson remained as Mother's sole attorney. Robinson sent a letter to the presiding family law judge, Judge Dan C. Grimmer. She asserted that, because she had filed a motion pursuant to Code of Civil Procedure section 170.6 more than 10 days earlier without any ruling on the motion, that Judge Grimmer must reassign the custody matter to another judge. She noted that Commissioner Porter "apparently signed an ex parte order reversing legal and physical custody" of the child on September 12, 2003, and now the Father and his attorney were attempting to enforce this "invalid" order through the district attorney's office. The court denied Mother's motion pursuant to section 170.6 for, among other things, being untimely.

One week later, on September 22, Mother filed an ex parte motion to modify visitation based on her relocation and to vacate or set aside the orders dated September 12 and August 29, 2003. On September 24, 2003, the court denied this motion pending a further hearing.

Counsel for Mother appeared at the hearing on October 1, 2003, but Mother did not appear. At the hearing, Robinson, Mother's attorney, stated that Mother had moved and she and the child no longer lived in the Bay Area. The court indicated that if Mother had prevented Father from having any contact with the child for the last month, Mother was in contempt of the court order. The court set Mother's motion regarding her moving away for November 4, 2003. The court ruled that Father had sole, legal and physical custody of the child and that Mother's move was in bad faith and intended to thwart Father's relationship with the child and therefore was not to be allowed. The court's order, signed at the hearing, authorized any law enforcement officer to enforce this order and directed Mother to deliver the child to Father immediately.

The court order following the October 1 hearing made the following findings: Mother had "violated the custody orders of this court"; Mother had "acted in bad faith in her alleged 'relocation' of the child"; Mother had "frustrated Father's custodial and visitation rights"; "relocation of child with Mother would be prejudicial to the child's welfare"; and it was "in the best interest of the child to grant Father sole legal and

physical custody because Mother had demonstrated that she had frustrated Father's custody and visitation rights."

The hearing on November 4 did not occur, because Mother could not appear because she was arrested on October 10, 2003[5] in Detroit, Michigan as a result of the court's order of October 1, 2003.[6] Mother's attorney, Robinson, appeared and reiterated her "continuing objection to the assignment of a commissioner to hear custody and visitation issues[.]" Robinson told the court the following: "[A]bsent a written stipulation prior to each hearing, a commissioner does not have the authority to hear and decide custody and visitation matters. No such stipulation has been signed by [Mother]. [¶] The commissioner's unauthorized exercise of authority beyond the scope permitted by law, shall be addressed through all necessary channels."

On November 7, 2003, Mother filed a notice of appeal. She stated that she was appealing from the postjudgment orders entered on September 12, September 17, and October 1, 2003.

On February 9, 2004, Mother pleaded nolo contendere to felony parental kidnapping (Pen. Code, § 278.5, subd. (a)). The probation report contained Mother's statement that she moved away "with advice and permission of my attorney . . . ." The court convicted Mother and sentenced her to 90 days in county jail.

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[5] Mother's attorney actually indicated that she was arrested on October 7, but the probation report indicates that the date of arrest was October 10, 2003.

[6] The probation report, which garnered its information from the San Mateo County District Attorney's Office and the Second Precinct of the Detroit Police Department, indicated that father met with the Detroit police officers on October 10, 2003, regarding the custody order and a warrant that had been issued for Mother in San Mateo County. That same day, Detroit police officers knocked on the door of a residence where the stepmother and father of Mother lived. The officers informed them that they had an arrest warrant for Mother. While inside, the officers heard noise emanating from the basement. One of the officers went into the basement and found Mother hiding in a furnace room. Mother was placed under arrest and refused to divulge the whereabouts of the missing child. Mother's stepmother told the officers where the child was and the girl was returned to Father.

On July 20, 2004, Father moved for monetary sanctions in this court against Mother and her attorney for filing a frivolous appeal. On August 9, 2004, we ruled that the motion would be taken under submission and decided with the appeal.

Our Appellate Decision

In our decision on Mother's appeal from the custody order and other interim orders, we upheld the lower court's ruling on custody and awarded sanctions in the amount of $15,030 against Robinson pursuant to California Rules of Court, rule 27(e). We concluded that sanctions were warranted for numerous reasons. Firstly, Mother had appealed from numerous nonappealable orders. Specifically, Mother appealed from temporary custody orders and improperly raised arguments particular to these interim orders. (See, e.g., *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 456; *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 559-560; see also Code of Civ. Proc., § 904.1.)

We also concluded that Robinson, as Mother's counsel, had misrepresented facts, ignored unfavorable facts, and made questionable representations in her briefs filed in this court. She also improperly raised issues for the first time in her reply brief. Further, and most significantly, we concluded that Mother's counsel had an apparent, if not an actual, conflict with Mother. Robinson refused to answer (on the basis that it might criminally incriminate her) any questions about whether she knew or advised Mother to leave the state with the child. Mother provided a declaration that stated that her attorney had not advised her to "conceal" her child, but remained silent about any advice regarding leaving the state with her child. The record contained the probation report, which indicated Mother had previously stated that Robinson advised her to move away. In light of the lower court's finding that Mother had acted in bad faith when fleeing with her child and counsel's unwillingness to divulge her knowledge or role regarding Mother's flight from the state, we observed that Mother's attorney had the appearance of a conflict, if not in fact an actual conflict, with her client and therefore should not have represented her on appeal.

No petition for rehearing was filed and, on April 11, 2005, this court issued its remittitur.

Hearings and Filings Following the Appeal

Following this court's imposition of sanctions, Robinson was charged with eight counts of misconduct. On May 6, 2008, the State Bar Court issued its decision. (Case No. 03-O-04802-LMA.) It found that clear and convincing evidence did not establish that Robinson committed acts of moral turpitude or other misconduct that warranted discipline.

On November 5, 2008, Robinson filed in the Supreme Court a "petition for writ of error *coram vobis* or other appropriate relief." She asserted that our prior decision contained five errors. She requested an order vacating this court's award of sanctions against her and for an award of attorney fees and/or sanctions against Father and Appellate Attorney Roth in the amount of $75,000. She also requested an order directing us to correct the five alleged errors.

On January 21, 2009, the Supreme Court granted Robinson's petition for writ of error *coram vobis* without requesting any briefing from Roth.[7] The Supreme Court

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[7] It is unclear why the Supreme Court granted Robinson's petition since Robinson never explains in her petition how any of her alleged "new" facts satisfy the requirements for a writ of *coram vobis*. (See our discussion of the requirements for this writ in part II.I., *post*) Indeed, the Supreme Court has observed that " '[i]n California, the writ has been used almost exclusively to attack judgments in criminal cases' [citation]." (*People v. Kim* (2009) 45 Cal.4th 1078, 1091, fn. 9.)

More significantly, Robinson filed a "petition for writ of error *coram vobis*" and it therefore should have been filed and decided in this court or the trial court, not in the Supreme Court. "At common law, the ordinary writ of error removed the case to a higher court, while the writ of error coram nobis was employed *to permit the court that gave the judgment* to reconsider it and give relief from errors of fact." (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 182, pp. 210-211.) As the Supreme Court has emphasized, a petition for writ of error *coram vobis* or *coram nobis* is " 'to enable the *same court* which had rendered the judgment to reconsider it in a case in which the record still remained before that court. . . . "The office of the writ of *coram nobis* is to bring the attention of the court to, and obtain relief from, errors of fact, . . . which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned." ' " (*People v. Kim, supra*, 45 Cal.4th at pp. 1091-1092, italics added.)

transferred the matter to our court with directions to vacate the award of sanctions against Robinson and to reconsider the award in light of the State Bar Court decision.

On January 26, 2009, Roth filed a letter in this court requesting an opportunity to brief the issue of the prior sanctions award. At Robinson's request, we set forth a briefing schedule for Robinson and Roth. In compliance with our order, Roth filed his brief on March 10, 2009, and Robinson filed her brief on March 11, 2009. Our court order provided that the responsive briefs from each attorney were due 15 days from the date of the filing of the original briefs.

In her brief filed on March 11, 2009, Robinson maintained that the State Bar Court hearing established that Father and Roth misrepresented facts in the brief filed in this court in 2004. Robinson requested restitution of $13,683.20, which represented the amount of sanctions she had thus far paid to Father. She also asserted that Father's "fraud upon the court warrants reversal of the October 1, 2003 custody order." She requested $76,939.42 in sanctions against Father and Roth for attorney fees and costs related to her defense in the State Bar Court, $75,809.05 in attorney fees and costs as sanctions against Father and Roth for expenses incurred in preparing and filing the petition for writ of error *coram vobis*, and $14,000 for attorney fees and costs as sanctions against Father and Roth for expenses incurred in preparing and presenting this motion in this court. She thus sought a total of $166,748.47 in sanctions against Roth and Father.

On March 19, 2009, we granted Roth's request for an extension of time to file his responsive brief. On that same date, Robinson sent by facsimile a request for an extension of time to file her responsive brief and claimed she should be permitted the same deadline as the one given to Roth. A request to extend time cannot be filed by facsimile and therefore we could not rule on this request. (Ct. App., First Dist., Local Rules, rule 10(b); see also Cal. Rules of Court, rule 8.50(c).) Robinson did not file her responsive brief by the due date of March 26, 2009. On April 27, 2009, Robinson attempted to file her untimely responsive brief with an application to file it. Although

Robinson's responsive brief is untimely, we consider it. On April 28, 2009, Roth filed a timely responsive brief.

DISCUSSION

I. *The Imposition of Sanctions Against Robinson Were Warranted*

The Supreme Court remanded the case for us to determine whether the sanctions we imposed against Robinson in the appeal of the order awarding custody to Father were still warranted in light of the State Bar Court decision. After we issued our nonpublished opinion and sanctioned Robinson, the State Bar charged Robinson with eight counts of misconduct. The State Bar Court in its decision filed on May 6, 2008, found that clear and convincing evidence did not establish that Robinson committed acts of moral turpitude or other misconduct that warranted discipline. Inexplicably, the State Bar Court did not have before it the question of Robinson's continued representation of Mother in the custody dispute despite evidence that she advised Mother to flee with the child.

On remand, Robinson asserts that the evidence presented at the State Bar Court hearing and the State Bar Court's findings establish that Father misrepresented facts to this court and the trial court. She claims that these "incorrect" facts were the basis of our sanctions award and therefore seeks restitution of the sanctions that she has paid Father. Additionally, she seeks sanctions against Father and Roth in the amount of $166,748.47. She also maintains that these "new" facts require a reversal of our prior decision to affirm the lower court's ruling on custody.

We easily dispose of Robinson's new and improper argument that we should reverse the trial court's custody order. The Supreme Court's remand was for us to consider the imposition of sanctions and we have no jurisdiction to reconsider our opinion on the custody order, which was final over four years ago.[8]

With regard to any alleged factual mistakes in our prior decision, Robinson failed to take the appropriate measure to address these alleged mistakes by filing a petition for

[8] Additionally, we note that Robinson brought her writ proceeding solely in her own name and has no standing to challenge the custody order affecting Mother and Father.

rehearing pursuant to California Rules of Court, rule 8.268. She is now belatedly complaining about errors that could have been corrected. The "new" facts presented by Robinson at the State Bar Court hearing could have been discoverable through due diligence or were facts she had at the time the custody hearings were taking place.

Robinson cites to various places in the State Bar Court decision where State Bar Court Judge Lucy Armendariz comments that our opinion must have accepted the facts as argued by Father as true. This court, unlike the State Bar Court, is not a fact finder. It is a basic rule of appellate review that we must presume the record contains evidence to support every finding of fact, and therefore we cite those facts that support the lower court's order. It is the appellant's burden, not the court's, to identify and establish deficiencies in the evidence. When the only evidence in the record on appeal regarding a particular fact is Father's declaration, the uncontroverted declaration is evidence, not argument. An appellate court will consider the sufficiency of the evidence to support a given finding *only after* a party tenders such an issue together with a fair summary of the evidence bearing on the challenged finding, particularly including evidence that arguably supports it. (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409-410.) Thus, facts submitted for the first time at the State Bar Court that could have been submitted during the hearings in the lower court or could have been corrected through the appropriate procedure of a petition for a rehearing have no effect on our earlier decision.

Nothing in the State Bar Court's decision alters our determination that sanctions against Robinson were appropriate: Robinson appealed from nonappealable orders, raised issues for the first time on appeal, and represented her client on appeal despite the appearance of a conflict and perhaps an actual conflict. Robinson quotes Judge Armendariz's opinion that such infractions "involve, at most, the elevation of form over substance." This statement has no bearing on our conclusion that Robinson exhibited a pattern of raising arguments that could not be raised on appeal because they related to nonappealable orders or were improperly raised for the first time in her reply brief. Indeed, Robinson's persistence in raising improper argument is apparent in her remand briefs as she here urges us to reverse the custody order of 2003 even though this court has

no jurisdiction over this issue and this issue is not within the scope of the Supreme Court's remand.

The State Bar Court decision also has no effect on our conclusion that Robinson offered a selective recitation of the facts in her opening brief filed in her appeal from the custody order. It is an elementary rule of appellate law that an appellant must fairly set forth all the significant facts, not just those beneficial to the appellants. (*In re S.C.* (2006) 138 Cal.App.4th 396, 402.) Thus, for example, Robinson argued that the trial court improperly considered Mother's financial situation when issuing its custody ruling. She omitted in both her statement of the facts and argument that, during the hearing, the trial court expressly stated when making its determination regarding custody that it was not considering Mother's financial condition even though it recognized that this issue had been raised.

Robinson's persistent refusal to follow the rules of this court continues to the present. Not only has she raised improper arguments, but she has ignored our court order setting forth the deadlines for filing the briefs on remand. Our order specified that Robinson's responsive brief was due March 26, 2009. On March 19, 2009, Robinson sent by facsimile a request for an extension of time to file her responsive brief on the ground that we had granted Roth's extension for time and it would therefore be unfair for her not to have the same deadline. Local Rules of the Court of Appeal, First Appellate District, rule 10(b) provides that the following four items may be transmitted by facsimile by counsel: "(1) civil case information statements; (2) stipulations for extensions of time; (3) changes of address; and (4) requests for oral argument." A request for extension of time is not one of the enumerated items. Furthermore, applications to extend time "*must* be accompanied by addressed, postage-prepaid envelopes for the clerk's use in mailing copies of the order on the application to all parties." (Cal. Rules of Court, rule 8.50(c), italics added.) Thus, this court cannot file or rule on a request to extend time transmitted by facsimile.

Robinson failed to file her responsive brief by the due date of March 26, 2009. Despite never receiving permission to file a late brief, Robinson on April 27, 2009, attempted to file her late responsive brief with an untimely application to file.

In her briefs filed on remand, Robinson continues her pattern of raising frivolous issues and does not make any attempt to show why the writ of remedy of error *corram vobis* or *corram nobis* applies to her.[9] " ' "The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment; and which without fault or negligence of the party, was not presented to the court." ' " (*People v. Kim, supra,* 45 Cal.4th at p. 1092.) As discussed more fully below, none of the alleged "new" facts raised by Robinson would have prevented our judgment. Moreover, any mistakes of fact in our decision were a result of Robinson's failure to include relevant evidence in the record on appeal or to file a petition for rehearing. In her brief on remand, Robinson makes *no* attempt whatsoever to explain how any of these "new" facts satisfy the requirements of *coram vobis.* Finally, Robinson has improperly used the Supreme Court's remand as an opportunity to reargue facts and issues that were not ever raised in her appeal of the custody ruling or relevant to either the State Bar Court or our decision.

Thus, nothing in the State Bar Court decision has any bearing on our conclusion that Mother's appeal lacked merit or that Robinson had the appearance of conflict when representing Mother on appeal. State Bar Court Judge Armendariz did not consider the apparent conflict between Robinson and her client. Mother appealed from the custody order, which gave custody to Father after Mother had pleaded nolo contendere to felony parental kidnapping (Pen. Code, § 278.5, subd. (a)). The probation officer stated that Mother told him the following: "[M]other told this officer that she regretted what had occurred, however, her attorney had advised her that she was within her rights to not only

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9 "Technically, when the petition is addressed to the trial court it is *coram nobis,* and when it is addressed to an appellate court it is *coram vobis.*" (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 941, fn. 5.)

take the child with her, but to conceal the child from her father, as well." The probation report also contained Mother's statement concerning the present offense. Mother stated in part: "I simply moved away with advice and permission of my attorney, but attorney's advice is no defense in this crime therefore that makes me guilty." The probation report disclosed that the district attorney's office provided "information indicating that [Mother's] attorney had, in fact, advised her to leave the area with the child, assuring her that she was within her legal rights." In addition, on October 3, 2003, the San Mateo County District Attorney's Office contacted Robinson. Robinson told the district attorney that on October 1, 2003, the court commissioner prohibited her from answering any questions related to her Fifth Amendment rights. She said that because of the commissioner's remarks, she would not comment at this time. Given that the lower court found that Mother had acted in bad faith when fleeing with her child and that Robinson refused to divulge her knowledge or role regarding Mother's flight from the state, Robinson's continued representation of Mother on appeal presented, at a minimum, the appearance of a conflict.

For the abovementioned reasons, we conclude that sanctions against Robinson were warranted. Although we need not go any further, we address each of Robinson's contentions in her brief on remand that alleged "lies" by Father and Roth uncovered at the State Bar Court hearing mandate the reversal of our decision to impose sanctions on her and require the imposition of sanctions against Father and Roth.

II. *Evidence of Alleged Misrepresentations by Father and Roth*

A. *The Court Order of August 21, 2003, and the Events on August 26, 2003*

Robinson declares that Father and Roth provided this court with false information regarding the trial court's order of August 21, 2003, and the related events of August 26, 2003. She contends that the misrepresentation should result in sanctions against them and the reversal of our sanctions award against her.

At the hearing on August 21, 2003, the trial court considered whether Father and Mother's child should attend school in Palo Alto rather than in Oakland. The court ruled that Palo Alto would be best for the child as long as she were promoted to first grade.

The record is indisputably clear that the child was to go to the Palo Alto school on Tuesday, August 26, 2003, and that both parents were to be there.

On August 26, 2003, Mother took the child to the school, talked to the principal, and left with the child. Father argued in his brief that Mother violated the court's order by, among other things, taking the child directly to the school rather than to his home first. Robinson asserts that Father's claim that she violated a court order by taking the child directly to school rather than to his home on August 26, 2003, was a lie and Father lied to cover up that he had misrepresented their daughter's address on the school application. Father stated on the application that the child lived with him in Palo Alto and Mother contends that she had been living with her in Oakland.

Mother asserts that the trial court did not direct her to take her child to Father's home and we wrongfully sanctioned her because we incorrectly concluded that Mother's taking the child directly to school violated a court order. With regard to the narrow question of whether Mother was to go to Father's home first or meet Father at the school, the record contained Father's declarations that Mother was to bring their daughter directly to his home. On August 28, 2003, Father filed an OSC for child custody and visitation and a request for ex parte relief. In support of this application, Father declared the following: "To facilitate the adjustment to the new school, the court granted petitioner mother's request to allow [the child] to stay overnight with her Monday, August 26th, the day before school started and *ordered that mother was to bring* [the child] *to father's home* on Tuesday morning so that both parties could go with [her] to school on her first day." (Italics added.) In her declaration filed on August 28, in opposition to Father's motion, Mother did not contradict this statement made by Father. Robinson has cited to no declaration by Mother that contradicted Father's assertion that Mother violated the court order when she failed to come to his house prior to going to the school.

It is not clear from the transcript of the hearing on August 21, 2003, if Mother was to take the child first to Father's house or if she was to take the child to the school and meet Father there so they both could accompany her into the school. At the hearing, the

court noted that school was to begin on Tuesday, and Robinson asked the court if the child could remain with Mother on Monday so on that day she could go to the Oakland school she had been attending. The court agreed. Subsequently, counsel for Father remarked: "Your Honor, my only point was would it be possible that the court make an order that the child come to my client on Monday so he can at least get her prepared for school. On Sunday night he would normally have her and he gets her prepared and acclimated . . . ." Counsel for Mother argued that it would aid the transition if Mother could take her to the new school Tuesday morning. The court answered: "That's probably right. I can certainly understand [Father] wanting to be the one who wants to take her there, but it might be very helpful if her senses are supportive [*sic*], this is approached by the fact that she's taken to school." Father asked if they both could take her. The court responded: "Why don't you both show up there at the same time . . . ."

Subsequently, the court stated: "Okay. Tomorrow evening after school goes with dad, comes home Sunday evening, goes to St. Leo's on Monday, stays with [Mother] Monday night. [Mother takes] her to school Tuesday morning, and dad will be there. All right. We are all on the same page?" Father responded, "She can come to my house and we'll go together." Counsel for Father asked: "What time does she need to be at your house?" At that point, the court went off the record.

Since there appeared to be a general agreement at the end of the hearing that Mother would come to Father's house and this was supported by Father's uncontroverted declarations in the record on appeal, the evidence in the record supported a finding that Mother was to go to Father's house prior to going to the school. Robinson is now tardily arguing that Mother was not to go to Father's house prior to going to the school.

Even if Robinson had brought this matter to this court's attention through the proper procedure and this court concluded that Mother did not agree to go to Father's house, this information would have had no effect on the result. The record is clear that the court ordered both parents to accompany the child on her first day at the school. Thus, Mother's going directly to the principal's office without notifying Father or waiting for him to arrive violated the court order. She also violated this and other court orders by

not permitting the girl to attend the school in Palo Alto and by disappearing with the girl. These violations were significantly more serious and formed the principal basis for our conclusion that she had violated court orders.

As for Mother's claim that Father misrepresented information on the school application, Father argues that the school form was accurately completed. The question of the accuracy of the information on the form was never an issue in the trial court or an issue on appeal. This form was not even in the record of appeal and any alleged misrepresentation on this form is completely irrelevant to our decision.

B. ***Mother's Acting in Bad Faith***

In our prior opinion, we stated that the record was replete with evidence that Mother acted in bad faith when she left the Bay Area. Robinson argues that our bad faith determination should be reversed because Father "lied" when he reported that he saw Mother's Mercedes leave when he went to her place to pick up their daughter on Sunday, August, 31, 2003. Father stated in the police report that he saw Mother leaving when he arrived at her residence on August 31, 2003. In his declarations submitted to the court, he said that he saw a car resembling Mother's distinctive Mercedes. Presumably, Robinson is arguing that our decision to affirm the lower court's bad faith determination was based on the mistaken "fact" that Father saw Mother fleeing on August 31, 2003.

At the State Bar Court hearing, Robinson produced evidence contradicting Father's assertion that he saw Mother on August 31, 2003. Robinson submitted a copy of a notice to repair that Mother received on her Mercedes from the California Highway Patrol. The ticket indicated that it was issued in Southern California at 3:47 p.m., on August 31, 2003.

Mother did not produce evidence of the ticket to the trial court and this ticket was not in the record on appeal. The only evidence in the record was Father's declarations that he believed he saw Mother's car. Not until we requested supplemental briefing on sanctions, did Robinson submit any evidence of the ticket. However, she simply attached the ticket to Mother's declaration submitted on December 28, 2004, in opposition to the

motion for sanctions against Robinson.[10] Robinson made no request to augment the record on appeal and we properly did not consider evidence not before the trial court when it made its decision.

Additionally, whether Father actually saw Mother fleeing was not critical to our decision. We did cite Father's statement that he saw Mother fleeing on August 31, 2003, as indicating that Mother was aware of the court order of August 29, 2003. However, we elaborated that, *even if Mother did not know of the specific order of August 29,* she knew about earlier orders of the court. We stressed that these orders consistently provided that the parents were to share custody of the child and, therefore, Mother's move and refusal to divulge the child's whereabouts supported the lower court's finding of bad faith. It is undisputed that Mother left with her child even if the exact date of flight was not actually when Father had come to her house on August 31, 2003. In fact, according to the date on the ticket, she left earlier than August 31, 2003.

Finally, Mother contends that sanctions should be imposed against Father and Roth because Father lied in his declarations filed in the court when he said that he saw Mother on August 31, 2003. In his declarations, Father did not say that he definitely saw Mother's Mercedes, but stated that he saw a car resembling Mother's distinctive Mercedes. The police report indicated that he stated that he saw Mother leaving when he

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[10] Mother's declaration did not even address the reason for attaching the ticket. Mother simply stated: "Attached hereto as Exhibit A is a copy of a Notice to Repair I received from the California Highway Patrol on Sunday, August 31, 2003[,] at 3:47 p.m. in San Fernando, California." Robinson stated in her declaration the following: "[A]t the hearing of this matter on October 1, 2003[,] I advised the trial court that I was in the process of obtaining documentation to prove that [Mother] was not in Oakland as [Father] claimed she was on August 31, 2003. At that point the trial court would not allow me to say anything further regarding [Mother's] whereabouts. However, the document I was referring to at the hearing was subsequently obtained and is attached as Exhibit A to the declaration of [Mother] filed concurrently herewith."

arrived. It is unclear whether Father mistakenly believed he saw Mother or he intentionally misrepresented that he had seen her.[11]

Accordingly, the fact that Father was incorrect when he said that he believed he saw Mother fleeing on August 31, 2003, has no effect on our conclusion that Mother acted in bad faith and defied court orders. Further, the record does not support an award of sanctions against Father for making this statement as Robinson has not established that Father knew that he did not see Mother's car when he claimed to have seen her fleeing.

C. ***Father's Statement Regarding His Occupation on His Child Abduction Complaint***

Robinson asserts that the abduction complaint Father filed with the San Mateo County District Attorney asked him his occupation and he reported that he was an attorney. Robinson complains that Father testified at the State Bar Hearing that he had not practiced as an attorney in any state for at least 15 years. Robinson makes no attempt to explain how this information is even tenuously related to our decision and this evidence is not "new" evidence that could not have been discovered by her during the hearings on the custody dispute in the trial court. Accordingly, this "new" evidence does not have any effect on our decision to impose sanctions against Robinson.

D. ***The Financial Conditions of Mother***

Robinson argues that Roth misrepresented facts to this court when he asserted that Mother's "argument that custody was changed on the basis of financial circumstances is specious, and fails to even mention the court's and evaluator's statements to the contrary[.]" Robinson claims, among other things, that this court simply accepted Roth's assertion that the evaluator and the trial court did not base their decisions on her

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[11] At the State Bar Court hearing, Father testified: "I felt very strongly that I saw her car at that time. In fact, I felt so strongly that I called her cell phone several times saying where are you? Why are you backing out of the driveway? So at the time I felt very strong that I saw her car, yes." He did admit that at some point he did know that she had received a ticket that day in Southern California. On December 9, 2003, he testified that the last time he had seen Mother was August 27, 2003, which may indicate he knew about the ticket by this date. Father stated at the State Bar Court hearing that he did not believe that it was his responsibility to correct the record.

economic situation and this was an error as the State Bar Court found that the evaluator did partially consider Mother's economic situation.

When setting forth the background of the custody dispute between Mother and Father, we detailed the evaluator's report and specifically noted the many comments that the evaluator made about Mother's economic situation and the evaluator's concerns about Mother's financial situation once Father was going to stop providing financial support. We were critical of Robinson's depiction of the evaluator's assessment to the extent that she did not address anywhere in her argument section the evaluator's disavowal of using financial considerations as the principal basis for her custody recommendation.

Although the foregoing may be deemed as a relatively minor problem with Robinson's argument, our concern with Robinson's rendition of the facts was greater as it related to what had happened in the trial court. We rightly criticized Robinson for completely omitting in her opening brief any reference to the trial court's express statement that it was not considering Mother's financial condition, but recognized this "issue [was] out there."[12] Robinson's failure to make any reference to this exchange anywhere in her opening brief, while arguing that the court's ruling was based on Mother's financial situation, was a serious omission.

This court thoroughly considered Robinson's argument that the lower court primarily focused on the comparative financial conditions of Mother and Father when making its custody decision, and concluded that her argument lacked merit. Our opinion remains unchanged that, in her opening brief in this court, Mother failed to furnish material facts that undermined her position.

E. ***The Scheduling of Jackson's Move-Away Motion***

In our decision, we stated that Mother filed an ex parte motion to modify visitation based on her relocation and to vacate or set aside the orders dated September 12 and August 29, 2003. We stated that the trial court denied Mother's motion " 'pending the

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[12] Indeed, this statement by the court was made in response to Robinson's statement that she objected to any reference to Mother's financial condition "to the extent that's used as a factor at any point to modify custody or visitation."

hearing' on October 1." Robinson argues that the October 1 date was incorrect and that the actual pending date was December 2003, the date set for the hearing on her relocation motion. She claims that we simply accepted Roth's incorrect assertion that the pending hearing was October 1.

We agree that the actual ex parte order simply states "pending the hearing" and does not specify the actual date. Father's brief indicated that the pending hearing was on October 1, 2003, and this assertion was not contradicted by Mother in her briefs on appeal. This court went through the record on appeal numerous times attempting to create a timetable, which included all of the motions and rulings that were involved in this case. This task was rather daunting given that the record was an "Appellant's Appendix" rather than the "Clerk's Transcript" and not all of the orders were included. Some of the orders were copies that did not have the file date stamp and the parties used different dates when referring to what appeared to be the same orders. Furthermore, some of the rulings were never memorialized in written orders.

If, in fact, the ex parte order was referring to a pending hearing in December 2003 that *never occurred* rather than to the October 1 hearing that did occur, our conclusion that the order was referring to the hearing on October 1 was incorrect. This alleged error could have been easily corrected had Robinson filed a petition for rehearing. We will not now consider her belated attempt to correct the facts.

Furthermore, the ex parte order was relevant only to Mother's argument that she had no notice that the court was going to rule on her move-away request on October 1, 2003. Our determination that Mother had notice that the trial court was going to rule on her move-away motion at the October 1, 2003 hearing, was not simply based on this ex parte order. As we noted, Robinson was at the August 21 hearing where the court stated that it would revisit the question of the child's going to school in Palo Alto at a hearing on October 1. Moreover, Mother knew that the court had granted Father's ex parte order on September 12, 2003, and this order gave him sole legal and physical custody of the child until the October 1 hearing. By the time of the October 1, 2003 hearing on permanent custody, Mother had moved away with the child to an undisclosed location.

Thus, our assessment of Mother's argument that she had no notice that the court was going to rule on her move-away request on October 1, 2003, as bordering on the absurd, remains unchanged even if we conclude that the ex parte order did not provide her with notice.

F. *Sole Custody of the Child*

Robinson argues that she was improperly sanctioned by this court for arguing that she had de facto sole physical custody of their child as of January 2000, and asserts that this court accepted Roth's dishonest argument that the parties had joint physical custody of the child. She points to the State Bar Court's statement that her "assertion had substantial legal support and it doesn't rise to the level of moral turpitude to argue it in court." This statement is not new evidence and does not affect our decision to sanction Robinson; nor does it support her contention that we should now impose sanctions on Roth. Our conclusion that her legal argument had no merit is unchanged.

G. *Preparation of a Court Order*

In our custody opinion, we criticized Robinson for arguing that Mother did not have to obey the trial court's oral order of August 21, 2003. We noted that this argument was baseless because a written order was not necessary for the court's order to be effective. (*Carter v. J.W. Silver Trucking Co.* (1935) 4 Cal.2d 198, 205 ["There is no material difference in the force or effect of an order given by written memorandum and one given in open court"].)

Additionally, we criticized Robinson for arguing that there was no written order because at the hearing on August 21, 2003, she promised to prepare a written order. At the State Bar Court hearing Robinson testified that her promise to prepare an order did not refer to the current hearing but to a child support order from a prior hearing held on July 8, 2003. Roth agrees that Robinson's promise related to a ruling in a prior hearing.

In this court's attempt to review the record independently, we read the transcripts of all the hearings. According to both parties, we incorrectly interpreted Robinson's promise to prepare an order to be referring to the current hearing on August 21, 2003. This error could have been easily fixed had Robinson filed a petition for rehearing, and

her failure to use the appropriate procedure waives any objection to this mistake in fact. Furthermore, this error is of no consequence since Robinson's argument that she did not have to obey the court's order, because it was not written, was entirely without merit.

H. *Rental Agreement*

Finally, Robinson argues that Father falsely asserted in his brief that Mother and he had entered into a lease agreement whereby Father would purchase a condominium in Oakland and rent it to her for $300 instead of paying child support to Jackson. Robinson now claims that Father never disclosed to this court that he never purchased this property or rented it to Mother. Rather, according to Robinson, he purchased a different condominium and charged Mother $775 to $800 a month. She alleges that this misrepresentation is sanctionable as we accepted Father's declaration when we said Mother paid $300 for rent. She further complains: "During oral argument, the Court of Appeal expressed disdain for [Mother's] inability to 'pay $300 in rent' to Father."

This argument highlights Robinson's refusal to follow court rules. The Supreme Court's remand was not to be used as an opportunity to reargue facts she never attempted to correct in a timely fashion. Although Father's uncontroverted declaration was sufficient evidence to support Father's argument that Mother paid $300 in rent, there was other evidence in the record on appeal supporting this fact. The record on appeal contained the October 1999 support agreement between Mother and Father, signed by both of them. This agreement provided: "Beginning January 1, 2001[, Mother] will be responsible for paying $300 a month rent to [Father] to help cover the condo fees and taxes. . . ."

I. *Robinson is Not Entitled to Restitution for the Sanctions Paid and Must Pay the Amount Still Owed*

For the reasons extensively discussed above, we conclude that none of the misrepresentations or errors alleged by Robinson warrants a reversal of our decision to impose sanctions on Robinson. " ' "The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have

prevented the rendition of the judgment; and which without fault or negligence of the party, was not presented to the court." ' " (*People v. Kim, supra,* 45 Cal.4th at p. 1092.) Robinson's entire brief on remand violates the essential purpose of the writ of error *coram vobis*, as she has raised nonessential facts in an attempt to persuade this court to revise its decision to impose sanctions.

The Supreme Court in *People v. Kim, supra,* 45 Cal.4th 1078, recently reaffirmed the requirement for granting a writ of *coram vobis* or *coram nobis*: " 'The writ of [error] *coram nobis* [or *coram vobis*] is granted only when three requirements are met. (1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." [Citations.] (2) Petitioner must also show that the "newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." [Citations.] This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. [Citations.] (3) Petitioner "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. . . ." ' " (*Id.* at p. 1093.)

A writ of error *coram vobis* is unavailable when a litigant has some other remedy at law. (*People v. Kim, supra,* 45 Cal.4th at p. 1093.) " 'A writ of [error] *coram nobis* [or *coram vobis*] is not available where the [party] had a remedy by (a) appeal or (b) motion for a new trial and failed to avail himself of such remedies.' " (*Ibid.*)

Here, as already stressed, Robinson never availed herself of the available remedy of a petition for rehearing. Robinson has made *no* attempt to explain how her "new" facts satisfy any of the requirements for a writ of error *coram vobis.* The "new" facts presented at the State Bar Court hearing were either known to Robinson at the time of the custody hearings in the trial court or were discoverable with due diligence. Further, none of these "new" facts would have prevented the imposition of sanctions against her.

Finally, although some of the "new" facts were simply trivial or irrelevant to the imposition of sanctions, other facts went to the merit of issues tried and Robinson has improperly attempted to reopen them at this late date. In sum, the State Bar Court hearing simply has no bearing on our decision to impose sanctions on Robinson and Robinson has failed to make even a slight attempt to explain how she satisfies any of the requirements for a writ of *coram vobis.*

III. *The Parties' New Request for Sanctions*

Robinson asserts that for the reasons discussed above, we should award sanctions against Father and Roth in the amount of $76,939.52 for her costs associated with the State Bar hearing, $75,809.05 for her costs in preparing her petition for writ of error *coram vobis*, and $14,000 in attorney fees for the preparation of this request for sanctions. We deny her request for sanctions. Robinson has attempted to misuse the judicial process by arguing issues not limited to "new evidence" raised at the State Bar Court hearing and arguing facts already adjudicated. Further, there was no "new evidence" that could not have been presented earlier at the custody hearings in the trial court and she failed to use the procedure available to her to correct any alleged errors in our decision. Finally, she has wasted this court's time by raising inconsequential issues such as the occupation Father listed in his abduction complaint.

Roth argues that Robinson has satisfied none of the criteria for the grant of relief through *coram vobis* and that her petition represents her continued attempts to harass Father and him.[13] Although Roth initially did not seek additional sanctions against Robinson, after he had to file a lengthy responsive brief to address the numerous allegations that Father and he lied, he now urges us to award sanctions on this court's own motion. He requests that we order restrictions on Robinson in the child custody matter between Mother and Father as Robinson, on behalf of Mother, has filed a motion in the superior court to change custody of the child from Father to Mother.

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[13] Roth maintains that Robinson has filed State Bar complaints against him as well as against Father in the places where he is licensed, Father's wife, and Father's trial counsel. He asserts that all of the complaints have been summarily dismissed.

Although we agree that Robinson has wasted this court's resources by raising issues outside the limited remand from the Supreme Court and by not presenting any evidence that satisfies the requirements for *coram vobis*, we are not going to issue any further sanctions.

DISPOSITION

The award of sanctions in the amount of $15,030 against Robinson is reaffirmed and Robinson's request for restitution is denied. No other sanctions are awarded against either party. The parties are to bear their own costs of the remand.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.